1966

Prospective-Prospective Overruling

Minn. L. Rev. Editorial Board

Notes

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> *To-day courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. . . .**

I. INTRODUCTION

Based on the Blackstonian premise that courts find the law rather than make it,[1] a decision overruling common law has traditionally been given retroactive effect[2] since the precedent

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* Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113-14 (1921).

1. The Blackstonian concept has been rejected as an unrealistic fiction since the nineteenth century. See AUSTIN, 2 JURISPRUDENCE 655 (5th ed. 1885), GRAY, THE NATURE AND SOURCES OF THE COMMON LAW 218-40 (2d ed. 1921), HOLLAND, JURISPRUDENCE 66 (13th ed. 1924), HOLMES, COMMON LAW 35 (1881); Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172 (1891).

2. Courts generally have not retroactively applied decisions overruling prior statutory or constitutional interpretations affecting contracts. See *e.g.*, Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 206 (1863), Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 415, 431-32 (1853), Farrior v. New England Mortgage Sec. Co., 92 Ala. 176, 181-82, 9 So. 532, 533-34 (1890). See generally Snyder, *Retroactive Operation of Overruling Decisions*, 35 ILL. L. REV. 121, 131, 133-34 (1940). The distinction between common law and statutory interpretation has been criticized. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 148 (1921), Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 COLUM. L. REV. 230, 244 (1918); Note 37 COLUM. L. REV. 1014, 1018 (1937); Note, 46 IOWA L. REV. 600, 602-03 (1961). *Contra*, von Moschzisher, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 424-25 (1924).

was viewed as never having been the law but merely erroneous evidence ot it.[3] In this century many courts have limited the retroactive effect in situations where there has been reliance on the prior law[4] or where stability was particularly valued.[5] Overruling decisions have been made wholly prospective by declaring the new rule of law to be applicable only to claims accruing after the filing of the instant opinion.[6] Other courts, believing that a wholly prospective application may discourage litigation of erroneous precedents,[7] have applied the rule to the instant case but otherwise prospectively.[8]

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3. [I]t is an established rule to abide by former precedents . . . . Yet this rule admits of exception, where the former determination is most evidently contrary to reason. . . . But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such sentence was *bad law*, but that it was *not law*. . . . (English modified.)

1 BLACKSTONE, COMMENTARIES *69-70. See generally BLACK, JUDICIAL PRECEDENTS, 689-91 (1912); SALMOND, JURISPRUDENCE 170 (2d ed. 1907).

The Blackstonian concept was rejected by the legal realists who advocated prospective overruling. Levy, *Realistic Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2-6, 25-30 (1960). See generally Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961).

4. Reliance on prior common law decisions is the chief rationale advanced in support of prospective overruling. AUERBACH, GARRISON, HURST & MERMIN, THE LEGAL PROCESS, 175 (1961); Littlefield, *Stare Decisis, Prospective Overruling, and Judicial Legislation in the Context of Sovereign Immunity*, 9 ST. LOUIS U.L.J. 56, 79 (1964) (examination limited to overruling of sovereign immunity); Note, 60 HARV. L. REV. 437, 440 (1947). Reliance need not be proven but is presumed by the court. Snyder, *supra* note 2, at 131 n.111; Note, 25 VA. L. REV. 210, 213 (1938).

5. Stability is protected best when precedent is not overruled at all. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 235 (1965). However, given an overruling, stability is affected less if there is a prospective limitation. *Id.* at 240.

6. *E.g.*, Great No. Ry. v. Sunburst Oil and Ref. Co., 287 U.S. 358, 364 (1932). Application of the admittedly erroneous precedent to the case at bar is not a violation of due process. *Id.* at 363-64.

The wholly prospective technique has been criticized on the ground that the new rule of law is only dictum. See von Moschizisher, *supra* note 2, at 424-27. *Contra*, CARDOZO, 55 REPORT OF N.Y.S.B.A. 263, 294-96 (1932); Currier, *supra* note 5, at 215.

7. Commentators have argued that this fear is exaggerated. See AUERBACH, GARRISON, HURST & MERMIN, *op. cit. supra* note 4, at 177; Currier, *supra* note 5, at 215; Note, 60 HARV. L. REV. 437, 440 (1947). *Contra*, Mishkin, *Forward: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 70 (1965); Note, 46 IOWA L. REV. 600, 614 (1961).

8. *E.g.*, Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). The constitutionality of *Molitor* is unsettled.

Recently the Supreme Courts of Minnesota and Wisconsin have extended the prospective nature of overruling by postponing the application of the new rule beyond the date of the opinion announcing the rule.[9] In *Holytz v. City of Milwaukee*,[10] the Wisconsin court abrogated sovereign immunity as to the case at bar and all cases arising more than forty days after the filing of the instant opinion. In two cases, the Minnesota court postponed the effect of the announced rule until the adjournment of the following legislative session. *Spanel v. Mounds View School Dist. No. 621*[11] prospective-prospectively abolished the defense of sovereign immunity, and *In re Jeruzal*[12] similarly held Totten trust assets subject to the forced share of the surviving spouse.

Prospective-prospective overruling represents a significant departure from previous concepts of overruling and is an important part of the legal process of those jurisdictions adopting it. Neither the courts[13] nor legal commentators[14] have exten-

See Mishkin, *supra* note 7, at 61 n.23; Note, 14 SYRACUSE L. REV. 53, 58-59 (1962).

9. In *Molitor*, *supra* note 8, the Illinois court achieved a similar postponement. *Molitor* held the new rule to be applicable only after the date of the final opinion. The final opinion was later held to be that given on rehearing. Bergman v. Board of Educ., 30 Ill. App. 2d 65, 173 N.E.2d 565 (1961). Since the rule of law announced in the original opinion was not modified on rehearing, the effective date of the change occurred several months after the first judicial pronouncement.

10. 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

11. 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962).

12. 269 Minn. 183, 195-96, 130 N.W.2d 473, 481-82 (1964).

13. In *Holytz*, the Wisconsin court was specific: "To enable the various public bodies to make financial arrangements to meet the new liability implicit in this holding, the effective date of the abolition of the rule of governmental immunity for torts shall be July 15, 1962." Holytz v. City of Milwaukee, 17 Wis. 2d 26, 42, 115 N.W.2d 618, 626 (1961). In Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962), the Minnesota court stated:

> The Minnesota Legislature has not wholly ignored the problem. . . . However, we do not share the view that a court-made rule, however unjust or outmoded, becomes with age invulnerable to judicial attack and cannot be discarded except by legislative action.
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> While the court has the right and the duty to modify rules of the common law after they have become archaic, we readily concede that the flexibiliy of the legislative process—which is denied the judiciary—makes the latter avenue of approach more desirable.
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> [T]he court is unanimous in expressing its intention to overrule the doctrine of sovereign tort immunity . . . after the next Minnesota Legislature adjourns, subject to any statutes which now or hereafter limit or regulate the prosecution of such claims. . . .
>
> Counsel has assured us that members of the bar, in and out of the legislature, intend to draft and secure the introduction of

sively discussed the rationale underlying this new judicial technique. Thus it is the purpose of this Note to suggest and examine the several rationales which may be asserted in its support. First, reliance on prior law, the reason generally advanced for ordinary prospective overruling, will be discussed. Second, specific references to the legislature suggests an inquiry as to the relevance of the legislative process.

II. RELIANCE ON PRIOR LAW

Certainly, if it is deemed unfair to impose a new rule of law retroactively because future litigants may have relied on the prior law,[15] it would similarly be unfair to apply the new rule immediately from the filing of the case announcing that rule without providing an opportunity to adapt to it.[16] For example, if the rule creates liability where previously none existed, the persons who might have to bear the liability ought to be given time to secure insurance or otherwise prepare to meet the bur-

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bills at the forthcoming session which will give affected entities of government an opportunity to meet their new obligations. . . .

Id. at 291-93, 118 N.W.2d at 803-04. (Footnotes omitted.) In In re Jeruzal, 269 Minn. 183, 130 N.W.2d 473 (1964), the court was even less specific:

> We would prefer the Restatement rule. . . . However, in view of the widespread use of Totten trusts we do not feel free to adopt the Restatement rule without first giving the legislature an opportunity to provide for it by statute. . . .
>
> The Totten trust is itself a judicial creation, limiting the effect of statutory provisions. . . . It is therefore our duty to subject this judicially-created doctrine to such limitations as are necessary to prevent the defeat of substantive statutory policies. . . .

269 Minn. at 195-96, 130 N.W.2d at 481.

14. The most extensive discussions of the technique have appeared in *The Minnesota Note*, 49 MINN. L. REV. 203, 211-12 (1964); 47 MINN. L. REV. 1124 (1963). Several commentaries have recognized the technique as unique but have not thoroughly analyzed it. MISHKIN & NORRIS, ON LAWS IN COURTS 316 (1965); Aigler, *Law Reform By Rejection of Stare Decisis*, 5 ARIZ. L. REV. 155, 170-71 (1964); Currier, *supra* note 5, at 214 nn.140-41, 221 n.65; Fordham, *Judicial Policy-Making at Legislative Expense*, 34 GEO. WASH. L. REV. 829, 837-38 (1966); Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEXAS L. REV. 1254, 1264 n.55 (1966); Lawyer, *Birth and Death of Governmental Immunity*, 15 CLEV.-MAR. L. REV. 529, 539-40, 543-44 (1966); Littlefield, *supra* note 4, at 72-74, 80; Mishkin, *supra* note 7, at 66 n.37; Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 287, 303 (1963); 16 OKLA. L. REV. 113, 115 (1963); 34 U. CINC. L. REV. 179, 183 n.31 (1965); 35 U. COLO. L. REV. 265, 266-67 (1962). However, this method of overruling has not been universally recognized as distinct from ordinary prospective overruling. See 46 MARQ. L. REV. 252, 254 (1962); 42 NEB. L. REV. 710, 719 (1963).

15. See note 4 *supra* and accompanying text.

16. See Peck, *supra* note 14 at 302.

den. This was the express rationale of *Holytz*[17] and would seem to justify use of the prospective-prospective technique in *Spanel*. On the other hand, the Minnesota court had suggested prior to *Spanel* that governmental immunity might be eliminated,[18] thus mitigating the reliance factor.

Jeruzal also presented some elements of reliance which would justify a postponement of the application of the new rule. The retroactive application of *Jeruzal* would have adversely effected the disposition of non-Totten trust assets due to the abatement process.[19] Thus, it would seem only fair to allow parties to adjust their estate plans.[20] However, since the use of a Totten trust to defeat the forced share obviously conflicted with the clear policy of the statute, it could be argued that parties relying on prior law were not deserving of the court's protection.[21]

Moreover, it is clear that accommodation to the new rule does not fully explain the overruling method of either *Spanel* or *Jeruzal*. The effective date selected by the Minnesota court in both cases, the adjournment of the following legislative session, bears no relationship to the time necessary to adapt to the new rule.[22]

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17. 17 Wis. 2d at 42, 115 N.W.2d at 626 (1962), 16 OKLA. L. REV. 113, 115 (1963).

18. It is arguable that reliance was a lesser factor in *Spanel* because the Minnesota court had announced several months earlier that the governmental immunity defense was soon to be re-examined. Reierson v. City of Minneapolis, 264 Minn. 153, 155-56, 118 N.W.2d 223, 225 (1962). However, it is probably unrealistic to expect a governmental body to procure insurance against a liability yet to be created.

19. Since under the Restatement rule estate assets abate before Totten trust assets, the rule may result in "an unintentional preference to the Totten trust beneficiaries over legatees under the decedent's will." *The Minnesota Note*, 49 MINN. L. REV. 203, 210 (1964).

20. Arguably a revocable intervivos trust can be used to defeat the wife's forced share since that device was explicitly excepted from the rule in *Jeruzal*. Thus such a trust may be used to accomodate *Jeruzal*. However, since no meaningful distinction can be made between a Totten trust and a revocable inter vivos trust, 34 U. CINC. L. REV. 179, 183-84 (1965), see 269 Minn. at 196, 130 N.W.2d at 481-83, presumably the Minnesota court will apply the same rule to revocable trusts. See Oehler, Hennemann, Harris & Hetland, *Minnesota Aspects of the Revocable Trust*, 8 MINNESOTA PRACTICE MANUAL 15 (1966).

21. This is analogous to retroactive "loophole" legislation in federal tax law. See Novick & Petersberges, *Retroactivity in Federal Taxation*, 37 TAXES 499, 519 (1959).

22. See 49 MINN. L. REV. 203, 211 (1964) See also 35 U. COLO. L. REV. 265, 267-68 (1962).

III. THE LEGISLATIVE PROCESS AND PROSPECTIVE-PROSPECTIVE OVERRULING

The Minnesota court has provided only a most general rationale for its position: prospective-prospective overruling was adopted to afford the legislature an opportunity to evaluate the problem before the new rule becomes effective.[23] To fully understand this reference to the legislative process it is first necessary to discuss the somewhat competing values in Anglo-American jurisprudence relating to the respective roles of the court and legislature as agents of law reform. Prospective-prospective overruling will be examined in light of those values.

A. The Court and Legislature as Agents of Law Reform

Rarely have courts clearly explained their reluctance to overrule well-established case law, preferring to rely on the conclusory phrase "only the legislature can legislate."[24] However, several reasons can be suggested. The most persuasive is that changes in policy underlying the well-established precedents should come from a representative body.[25] Also, in certain cases the court may find its earlier decisions made binding by legislative acquiescence[26] or pre-emption.[27] Finally, the courts

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23. See 47 Minn. L. Rev. 1124, 1131 n.40 (1963).

24. See Aigler, *supra* note 14, at 174; Keeton, *supra* note 14, at 1267.

25. See Williams v. City of Detroit, 364 Mich. 231, 249, 111 N.W.2d 1, 9 (1961); Fordham, *supra* note 14, at 838; 47 Minn. L. Rev. 1124, 1125-26 (1963); *cf.* Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 Texas L. Rev. 247 (1947).

26. See Martino v. Grace-New Haven Community Hosp., 146 Conn. 735, 148 A.2d 259 (1959); Schultle v. Missionaries of La Salette Corp., 352 S.W.2d 636 (Mo. 1961). *But see* Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). See generally Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 Texas L. Rev. 247 (1947).

One reason suggested for not implying legislative acquiescence when the legislature has considered the particular reform but rejected it is that the reasons why it failed to pass are unrelated to the merits of the reform. Peck, *supra* note 14, at 292. See Cleveland v. United States, 329 U.S. 14, 23 (1946) (concurring opinion). This view might well be criticized. See Breitel, *The Courts and Lawmaking*, in Legal Institution Today and Tomorrow 12 (1959); Horack, *Cooperative Action for Improved Statutory Interpretation*, 3 Vand. L. Rev. 382, 390 n.34 (1949). See generally Auerbach, Garrison, Hurst & Mermin, *op. cit. supra* note 4, at 660-62.

27. See, *e.g.*, Boyer v. Iowa High School Athletic Ass'n, 256 Iowa 337, 127 N.W.2d 606 (1964), 50 Iowa L. Rev. 226; Fette v. City of St. Louis, 366 S.W.2d 446 (Mo. 1963). *Contra, e.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961); Molitor v. Kaneland Community

face certain institutional limitations. The legislature may have facilities better adapted to the development of factual issues raised by suggested reforms.[28] In addition, the legislature has a greater flexibility in the fashioning of remedies.[29]

The most compelling argument for an active judiciary assumes that, while a representative body may be theoretically a better agent of law reform,[30] the legislature cannot[31] or will not[32] perform this function and therefore the courts must assume a dynamic role in the development of the law.[33] Furthermore, since the legislature can always overrule the court, it is argued that the court should not hesitate to be active.[34]

B. Prospective-Prospective Overruling and Law Reform

Obviously a court adopting prospective-prospective overruling is not persuaded by the arguments for judicial restraint to the extent that it will not overrule. However, those considerations may be the basis for its conclusion to postpone the effect of the new rule. Furthermore, since judicial initiation of law reform does not pre-empt subsequent legislative examination, the rationales supporting prospective-prospective overruling are narrowed to those which relate to the nonestablishment of the judicial rule during the interim between the overruling of the precedent and the possible enactment of legislation.

Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962).

28. See Spanel v. Mounds View School Dist. No. 621, *supra* note 27; Peck, *supra* note 14, at 296-97; 49 Minn. L. Rev. 203, 211 (1964).

There are factors which may mitigate against this alleged legislative superiority. Legislative fact finding facilities are generally inefficient in the collecting of meaningful scientific data. See Peck, *supra* note 14, at 276-78. Furthermore, amicus curiae and Brandeis briefs may provide similar information to a court. See Peck, *supra* note 14, at 277, 296.

29. See Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962). An excellent discussion appears in Peck, *supra* note 14, at 299-300. The legislative process may be preferable for these reasons. First, the ultimate remedy may be foreign to the judicial process, *e.g.*, limits on the amount of recovery. Secondly, the legislature may provide administrative procedures. Finally, the legislative process may remedy a related area not raised by a case in controversy.

30. See Keeton, *supra* note 14, at 1260.

31. *Id.* at 1261-62. See Hart, *Comment*, Legal Institution Today and Tomorrow 44-45 (1959).

32. See Keeton, *supra* note 14, at 1262; Peck, *supra* note 14, at 269-70.

33. See Keeton, *supra* note 14, at 1259-64.

34. *Id.* at 1263-64; 47 Minn. L. Rev. 1124, 1131 (1963).

1. Hardship of Accomodating to an Interim Rule

Courts may adopt prospective-prospective overruling when a legislative reaction is anticipated. Courts often overrule to prompt legislative consideration of what the court considers necessary reform.[35] However, such judicial impetus may cause hardship when there is a recognized need for stability in the area of law affected.[36] If normal methods of overruling are utilized and the legislature does react, stability will be disrupted twice—first by the judicial rule and then by the legislative rule.[37] By postponing the effective date of the new rule to the end of the next legislative session this hardship is eliminated. If the legislature does react, the judicial rule will never become effective.[38] A less significant end achieved by utilizing prospective-prospective overruling when a legislative reaction is anticipated is that of economy of judicial administration, since the interim rule will not have to be applied by lower courts.[39]

The desire to avoid the hardship of an interim rule does not fully explain the use of the technique in *Jeruzal.* Since legislation does not usually occur unless supported by lobby or pressure groups,[40] a modification of the rule established in *Jeruzal* was not likely because an organized interest group favoring such a change was not readily discernible.

2. Preservation of Status Quo for Legislative Action

The need for stability may dictate the adoption of prospective-prospective overruling for another reason. As has been pointed out, legislative reaction to judicial overruling may necessitate a second disruption of stability in a relatively short time. The prospect of a second disruption may itself inhibit legislative action. Therefore, a court recognizing this possibility

35. See Horack, *supra* note 26, at 390; Keeton, *supra* note 14, at 1263; 47 MINN. L. REV. 1124, 1131 (1963). While the injustices of the old rule probably will not cause the formation of lobbying groups, those persons favoring the status quo will bring the judicial reform to the attention of the legislature. See Peck, *supra* note 14, at 282, 286-87; James, *Tort Law in Midstream: Its Challenge to the Judicial Process,* 8 BUFFALO L. REV. 315, 334 (1959).

36. See Currier, *supra* note 14, at 235-36.

37. Of course this is true whether or not normal prospective overruling is utilized.

38. This is apparently the rationale advanced in *The Minnesota Note,* 49 MINN. L. REV. 203, 211-12 (1964); 47 MINN. L. REV. 1124, 1130-31 (1963).

39. See Currier, *supra* note 14, at 236.

40. See Peck, *supra* note 14, at 281 and authorities cited in nn.83-86.

and wishing to promote legislative action may adopt prospective-prospective overruling to preserve the status quo until the legislature has had an adequate opportunity to consider the problem.

The Minnesota court's indication that it considered a legislative solution preferable[41] suggests that this rationale may underlie the adoption of prospective-prospective overruling in both *Spanel* and *Jeruzal*. The court's preference for a legislative solution is easily understood in *Spanel*[42] since the legislature would be able to provide remedies foreign to the judiciary, such as providing for monetary limits on recovery, notice of claims, or authority to insure.[43] On the other hand, *Jeruzal* did not present a situation peculiarly requiring legislative solution.[44] The court apparently considered such a solution preferable on the general ground of representative government.[45]

3. Lessen Probability of Irrational Legislative Reaction

If the court concludes that the legislature considers itself the proper agent of law reform, the court may adopt prospective-prospective overruling to lessen the probability of legislative reaction. Any legislative opposition to the substance of the new rule may be heightened if the legislature views the judicial initiative as usurping a legislative function.[46] Thus, legislative reaction may be in part a vindication of legislative authority. By postponing the effective date of the new rule to the adjournment of the following legislative session, the infringement upon the legislative function is lessened because the overruling decision appears designed to accommodate rather than usurp the

41. See note 13 *supra*.

42. See 49 MINN. L. REV. 203, 211-12 (1964); 47 MINN. L. REV. 1124, 1131 (1963).

43. 264 Minn. at 293, 118 N.W.2d at 804.

44. 49 MINN. L. REV. 203, 212 (1964). *Cf.* Peck, *supra* note 14, at 297-98.

45. See 269 Minn. at 195-96, 130 N.W.2d at 481. The court may also have felt that because the prior rule affected the application of the intestacy statute, failure of the legislature to amend that statute to refuse the rule constituted a legislative acquiescence.

46. Probably the greatest danger of an active and openly creative reform role for the judiciary is that it might produce or even facilitate a legislative counterattack by the lobbies and pressure groups that favor the status quo . . . . If revision is made demonstrably as a function of policy-making, it probably will be easier for lobbies and pressure groups to convince legislators that they are as competent as judges to make such decisions.

Peck, *supra* note 14, at 293.

legislative process. Thus, prospective-prospective overruling can be used to discourage an irrational reaction to the judicial decision and confine legislative action to constructive consideration of the merits of the reform.[47]

4. Mitigate Legislative Rebuff

Some courts are reluctant to overrule for fear that a legislative reaction will be viewed as a rebuff.[48] Since the power of the judiciary is dependent in large measure upon respect,[49] a court may not be concerned only with how judicial initiative ought to be viewed[50] but how, in fact, it is viewed. The primary institution for the manifestation of public policy is the legislature.[51] Although a court must necessarily make determinations of public policy when deciding an unprovided case, such determinations need not be made in regard to a provided case.[52] Consequently, when a court does make policy determinations by overruling a provided case, such a practice may be viewed as presumptuous. Moreover, if the court misjudges public policy in overruling a precedent, a subsequent reversal by the legislature[53] may serve to equate the latter's view of public policy with "the public policy,"[54] and the concurrence of presumptuousness and misjudgment may seriously injure the prestige of

47. A similar argument has been suggested in support of the normal prospective limitation of decisions abrogating governmental and charitable immunities. It is argued that the unfairness of the retroactive application of the new rule could heighten the reaction of the legislature to the substance of the rule. See Mishkin, *supra* note 7, at 71.

48. See Keeton, *supra* note 14, at 1263.

49. See Currier, *supra* note 14, at 238; Note, 71 YALE L.J. 907, 931 (1962).

50. It has been argued that a legislative reversal of an overruling decision should not be regarded as a rebuff but that the roles of an active judiciary and the legislature can be complementary. In certain situations the need for law reform will not come to the attention of the legislature unless the court takes the initiative. Judicial initiative is viewed as a *sine qua non* to legislative manifestation of public policy on the particular issue of law reform. Thus, it is concluded that judicial initiative is not antagonistic to representative government but rather is a necessary stimulus. See Keeton, *supra* note 14, at 1263-64; Peck, *supra* note 14, at 286, 292-93.

51. See CAHILL, JUDICIAL LEGISLATION 4 (1952); Currier, *supra* note 14, at 272; James, *supra* note 35, at 340-41; Peck, *supra* note 14, at 285.

52. Rogers v. Florence Printing Co., 233 S.C. 567, 574, 106 S.E.2d 258, 261-62 (1958).

53. At least one writer concludes that courts frequently view public policy differently from the legislature. Aigler, *supra* note 14, at 158.

54. AUERBACH, GARRISON, HURST & MERMIN, *op. cit. supra* note 4, at 660-62.

the court.[55]

The loss of respect is further heightened when ordinary methods of overruling are utilized because the "erroneous" judicial rule will be applied during the interim.[56] Prospective-prospective overruling will mitigate the effect of the judicial rebuff by eliminating the interim rule. Further, because such an overruling is a far more tentative judicial assertion, any legislative reaction probably will not be regarded as a censure of the court holding.[57]

IV. CONCLUSION

A recent Minnesota case[58] prospectively abrogating intrafamily immunity between parent and child may be an indication that prospective-prospective overruling has been abandoned by the Minnesota court.[59] The decision seemed to be an appropriate occasion for prospective-prospective overruling since it was based on public policy; and it may be reasonably expected that an organized interest group will oppose the court's ruling. As most intrafamily suits arise out of the operation of automobiles, presumably the insurance lobby will be interested in re-establishing family immunity[60] for much the same reasons that guest statute legislation is supported by them.[61] A primary consideration prompting guest statute legislation is to prevent collusive lawsuits.[62] Furthermore, it may be hoped that the driver's lack of liability will encourage guests to protest acts of negligence.[63] Although such considerations have not

55. This attitude may be typified by the comment that judicial initiative represents a "Daddy Knows Best" attitude. See Aigler, *supra* note 14, at 164.

56. See Currier, *supra* note 14, at 239:

> [G]iven this strong tendency to universalize ethical judgments, any application of different rules to persons similarly situated—when the rules embody ethical values—tends to impair the image of justice, and to undermine public confidence in the administration of law. . . .

57. However, one commentator has suggested that the legislation subsequent to *Spanel* may have been intended as a judicial rebuff. Aigler, *supra* note 14, at 172.

58. Balts v. Balts, 142 N.W.2d 66 (Minn. 1966).

59. The dissenting opinion advocated adopting the *Spanel* technique. *Id.* at 78-79.

60. See Pedrick, *On Civilizing the Law of Torts*, 6 J. Soc. Pub. T.L. 2, 8 (1961) (husband-wife immunity supported by insurance lobby).

61. Wright, *The Adequacy of the Law of Torts*, 6 J. Soc. Pub. T.L. 11, 23 (1961).

62. See Note, 54 Nw. U.L. Rev. 263, 265 (1959).

63. This rationale may be suggested by judicial interpretation of guest statutes since guest protests may result in a finding of a degree of

prompted the Minnesota legislature to adopt a guest statute, this does not imply that the legislature would not be persuaded by such factors in the context of parent versus child tort immunity. Intrafamily collusion seems more probable than as between driver and guest. Similarly, a parent is in a better position to censure acts of negligence.

Prospective-prospective overruling represents the most radical departure from what the neo-Blackstonians consider the symbolic role of the judiciary. Blackstone's concept that courts find law rather than make it is considered to be a fundamental symbol upon which the courts prestige and power rests.[64] A prospective limitation resembles legislation even more than retroactive overruling[65] and thus hardly constitutes "finding the law." In situations clearly involving reliance, the neo-Blackstonian analysis would consider a prospective limitation justifiable.[66] However, since prospective-prospective overruling as adopted by the Minnesota court goes beyond reliance, the technique is a most incisive example of making law and thus destroys the loyalty that the Blackstonian concept commands.[67]

On the other hand, prospective-prospective overruling may be viewed as a response to a long recognized deficiency in the Anglo-American legal process. In many situations the courts are best able to recognize and fully appreciate need for reform,[68] although the judiciary is not the institution primarily responsible for declaring public policy. And the courts may not be best able to provide the remedy.[69] On several occasions the establishment of an official liaison between the court and legislature has been advocated.[70] Judicial concern and experience would thus

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negligence sufficient to allow recovery. II HARPER & JAMES, THE LAW OF TORTS 957-58 (1956).

64. See Mishkin, *supra* note 7, at 59-60.

65. *Ibid. But cf.* Kocourek & Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971, 996 (1935).

66. See Mishkin, *supra* note 7, at 60.

67. *Id.* at 66.

68. Green, *The Trust of Tort Law: Part II, Judicial Law Making*, 64 W. VA. L. REV. 115, 121 (1962); Peck, *supra* note 14, at 299.

69. See Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41, 51-52 (1949).

70. GARDINER, LAW REFORM NOW 6, 13-14 (1963); Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 124-25 (1921).

Although there are many law reform commissions, many do not provide an effective communication with the judiciary. Cardozo considered this element essential. CARDOZO, THE GROWTH OF THE LAW, 120-21 (1924). The varying degree to which courts participate is illustrated by comparing two notable commissions. Although the New York Law Revisions Commission must "receive and consider" judicial suggestions and

be communicated to the legislature for consideration. In the absence of the official communication, overruling of precedent may be the only effective way to prompt legislative consideration. However, unlike an official method of communication, normal methods of overruling will cause an interim rule to be established. Prospective-prospective overruling may establish communication without the disadvantages of the interim rule.

An analysis of prospective-prospective overruling illustrates that judicial overruling of precedent may require thoughtful consideration of factors beyond the substantive merits of the rule itself. Furthermore, it illustrates the inadequacy of the argument that the courts should not hesitate to overrule since the legislature can always reverse the judicial determination.

"examine the common law . . . and current judicial decisions," there is no requirement that such proposals ultimately be submitted to the legislature. N.Y. LEGIS. LAW § 72. The English Law Commission is under the control of the Lord Chancellor. See generally Dworkin, *The Law Commissions Act, 1965*, 28 MODERN L. REV. 675 (1965).